Supreme Court, U.S.
1993
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No. 92-1284

In the Supreme Court of the United States

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation as receiver was immune from punitive damages awarded under state law where it became receiver for the financial institution against which the damages were awarded before entry of a final unappealable judgment awarding such damages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 970 F.2d 16. The order of the federal district court and the judgment of the state district court (Pet. App. B1-B13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1992. A petition for rehearing was denied on November 10, 1992. Pet. App. D1-D3. The petition for a writ of certiorari was filed on February 1, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into an agreement to purchase certain drilling rights from C.I. Oil, Inc., and deposited funds in MBank to be used for that purchase. Thereafter, petitioner and CI disagreed about the arrangement, petitioner refused to authorize MBank to disburse the funds, and CI advised MBank that it would hold MBank liable if MBank did not disburse the funds. MBank then froze the account and demanded that petitioner settle her dispute with CI. When petitioner subsequently instructed MBank to release the funds to CI, MBank refused and filed an interpleader action in state trial court, insisting that petitioner and CI resolve their repeated differences. After petitioner and CI settled their differences, MBank again refused to release the funds or dismiss its action until petitioner released it from liability. When petitioner agreed to release MBank from liability, MBank released the funds and dismissed the interpleader action. Pet. App. A2-A4.

2. The day after the interpleader action was dismissed, MBank accelerated the date of maturity on two secured loans to petitioner and demanded that petitioner repay those loans and two other unsecured loans within five days. After liquidating the collateral for the two secured loans, MBank commenced an action against petitioner in the state district court in Harris County, Texas, seeking a deficiency judgment on one of the secured loans, as well as recovery on the two unsecured loans. Petitioner filed counterclaims, alleging that the release of MBank she signed in

connection with the interpleader action had been induced by fraud and economic duress; that MBank had acted tortiously in freezing her accounts; that MBank had acted wrongfully in accelerating the date of maturity of her loans; and that MBank had conspired with her former business partner and violated the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41-17.63 (West 1987 & Supp. 1993). Pet. App. A4-A5.

After a seven-week trial, the jury returned a verdict for petitioner on her counterclaims. The trial court entered judgment on the jury verdict, after deducting from the jury award the past due principal and interest on the two unsecured loans. The court entered a take-nothing judgment on MBank's suit for a deficiency on one of the secured loans. The judgment in favor of petitioner totalled $9,639,841.65, including $5.2 million dollars in punitive damages and "additional" damages under the DTPA.[1] MBank filed post-trial motions seeking a new trial and asking the trial court to modify, correct, or reform the judgment. Pet. App. A5-A7; A35-A36.

3. Before the trial court ruled on MBank's post-trial motions, the Office of the Comptroller of the Currency declared MBank insolvent and appointed the FDIC as receiver. The FDIC removed the matter to federal district court. The FDIC and Bank One, N.A. (the successor in interest to MBank as holder of petitioner's loans), filed briefs in support of MBank's

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[1] In certain circumstances, the DTPA authorizes "additional" damages in an amount not to exceed twice the amount of actual damages. See Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (West 1987 & Supp. 1993).

motions, in which the FDIC argued that it was immune from punitive damages in its capacity as receiver. The district court treated the motions as motions to alter or amend the judgment under Fed. R. Civ. P. 59(e) and denied the motions.

4. The court of appeals affirmed the judgment against the FDIC for compensatory damages but reversed the award of punitive damages and additional damages under the DTPA as infringing on the FDIC's immunity from suit, Pet. App. A35-A40. The court explained that petitioner "d[id] not dispute that the FDIC is immune from suit," but argued that the FDIC should not be permitted to interpose the defense of immunity "when it intervenes post-judgment." *Id.* at A35-A36. The court rejected that argument, because the FDIC "raised the punitive damage issue in the district court * * * before the time for filing a notice of appeal had expired, * * * when there was no final unappealable judgment." *Id.* at A36.

The court of appeals also rejected (Pet. App. A38-A39) petitioner's reliance on *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d 266 (5th Cir. 1989). In *Olney*, the court ruled that punitive damages could be assessed against a bond that had been posted by a financial institution before a conservator was appointed. The court of appeals in this case explained that *Olney* rested on the conclusion that "when the bond was posted * * * , the funds ceased to be assets of the insolvent institutions, and therefore were not a part of the conservatorship estate." Pet. App. A39. In this case, by contrast, any judgment "would * * * be drawn from

assets available for distribution by the receiver" and thus improperly would infringe on the receiver's immunity from suit. *Ibid.*

Finally, the court rejected (Pet. App. A39-A40) petitioner's argument that the immunity defense could not be raised after judgment, explaining that the defense "is a jurisdictional prerequisite which may be asserted at any stage of the proceedings, either by the parties or by the court on its own motion." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 7-9) that the FDIC's assertion of its immunity defense was too late to be effective. We disagree. As a matter of federal common law, the federal courts traditionally have declined to allow the imposition of punitive damages on federal receivers.[2] The rule rests on the view that punitive damages are intended to punish a wrongdoer and deter future conduct, purposes that would not be furthered by depleting the estate of a failed enterprise. The assessment of punitive damages against a receiver would punish only the innocent creditors of the enterprise. See, *e.g.*, *FDIC* v. *Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991) (a "claim which is punitive in nature * * * cannot be asserted against the FDIC as

[2] Although petitioner suggests (Pet. 5-6) that the FDIC as receiver is not entitled to immunity, that question is not properly presented. As the court of appeals understood petitioner's arguments below, petitioner "d[id] not dispute that the FDIC is immune from suit." Pet. App. A35. Accordingly, the question is not properly before the Court. Compare *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991). In any event, for the reasons summarized in the text, the claim is meritless.

such application could have no deterrent effect, and would only serve to punish innocent creditors"), cert. denied, 112 S. Ct. 2301 (1992); *Commerce Federal Savings Bank* v. *FDIC*, 872 F.2d 1240, 1247-1248 (6th Cir. 1989); *Anderson* v. *Hershey*, 127 F.2d 884, 887 (6th Cir. 1942) ("But when the bank is in receivership any depletion of the estate over and above [compensatory relief] will affect creditors and depositors who were in no way connected with or responsible for the usurious transaction.").[3]

Petitioner offers no substantial support for the argument (Pet. 7-9) that the defenses that otherwise would be available to the receiver are vitiated if the receiver is not appointed before the trial court's judgment is entered. To the contrary, in cases where the Resolution Trust Corporation (RTC) and the FDIC have special federal defenses that were not available to a failed institution at the time of trial (because the federal entity became a party to the case after the trial), the courts consistently have allowed the federal entity to raise such defenses for the first

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[3] See also *RTC* v. *Mooney*, 592 So. 2d 186, 189-190 (Ala. 1991) (RTC as receiver not subject to punitive damages because the damages would have no deterrent value and would punish innocent depositors and creditors); *Lane* v. *Schilling*, 279 P. 267, 270 (Or. 1929) (incorrect to impose punitive damages on receiver of failed national bank); *Professional Asset Management, Inc.* v. *Penn Square Bank, N.A.*, 566 F. Supp. 134, 136-137 (W.D. Okla. 1983) (punitive damages against FDIC as receiver barred because "an award of punitive damages against the receiver would not punish the Bank, but its innocent creditors and uninsured depositors"); *Tuxedo Beach Club Corp.* v. *City Fed. Sav. Bank*, 749 F. Supp. 635, 649-650 (D.N.J. 1990).

time on appeal. See, *e.g.*, *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332, 1342-1344 (1st Cir. 1992) ("[I]t would have been unfair to prevent the FDIC from raising its federal defenses when it had no * * * opportunity to assert them before the bankruptcy court."); *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160, 1163-1164 (5th Cir. 1992); *RTC* v. *McCrory*, 951 F.2d 68, 71 (5th Cir.) ("[T]he federal regulator had no opportunity to raise its special defense in the trial court, and * * * it should not be penalized on appeal for that lack of opportunity."), cert. denied, 113 S. Ct. 459 (1992); *Baumann* v. *Savers Federal Savings & Loan Association*, 934 F.2d 1506, 1512-1513 (11th Cir. 1991) ("RTC * * * should not be penalized for not raising a defense it had no opportunity to present."), cert. denied, 112 S. Ct. 1936 (1992); see also *RTC* v. *Winslow*, 12 Cal. Rptr. 2d 510, 516-517 (Ct. App. 1992).[4]

Indeed, as the court of appeals noted (Pet. App. A36 n.17), Congress has now articulated a rule regarding when it is too late for the FDIC to challenge judgments. The FDIC cannot challenge a "final unappealable judgment * * * which was rendered before the appointment of the Corporation as conservator or receiver." 12 U.S.C. 1821(d)(13)(A) (Supp. III 1991).[5]

[4] The Court recently denied a petition arguing that the RTC could not raise its special federal defenses for the first time on appeal. *Ward* v. *RTC*, cert. denied, 113 S. Ct. 1412 (1993).

[5] Section 1821(d)(13)(A) was not enacted until August 9, 1989 (by Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 232), but it apparently did not change the law on this point significantly. A similar result had been reached by

That rule would not have barred the FDIC's claim in this case, because the FDIC interposed its defense before the time for appealing the judgment had passed. See Pet. App. A36. Petitioner's argument that the FDIC was absolutely barred from interposing its defenses by the state trial court's entry of judgment simply ignores the implications of the limitation of the statutory bar (and the prior rule that it codifies, see note 5, *supra*) to a final unappealable judgment.

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judicial interpretation of 12 U.S.C. 91, which generally bars any attachment of the assets of an insolvent national bank "before final judgment." See also 12 U.S.C. 1819 (Fourth) (1988) (barring any "attachment or execution * * * against the Corporation or its property before final judgment"). As the Fifth Circuit concluded in *United States* v. *Lemaire*, 826 F.2d 387 (1987), cert. denied, 485 U.S. 960 (1988), the reference to a final judgment "means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review." *Id.* at 390. By deferring execution on a judgment, the statute effectively enables the FDIC to raise new defenses in accordance with the customary rules courts have developed for considering claims not raised in a trial court. As the text explains, those rules generally have been interpreted to allow the FDIC to raise claims on appeal that it did not have an opportunity to present at trial.

We note that petitioner conceded that the state court's judgment did not become final for purposes of 12 U.S.C. 91 in an earlier action by the Comptroller of the Currency to prevent petitioner from creating a lien on MBank's property based on the state trial court's judgment in this case. See *United States* v. *FDIC*, 881 F.2d 207, 209 (5th Cir. 1989) (citing *Lemaire*) ("[Petitioner] does not argue that her judgment is final."), cert. denied, 493 U.S. 1072 (1990).

Petitioner errs in contending (Pet. 7-8) that the FDIC could not raise the claim after the trial court's judgment because the claim would affect the "ratable distribution" of the receivership estate. Taken to its logical conclusion, that argument would mean that the receiver could not appeal *any* trial court judgment. Even petitioner acknowledges that the FDIC could have challenged the award as "undeserved or too severe." Pet. 8. Petitioner articulates no basis for allowing the receiver to challenge the award on those grounds but not allowing it to challenge the award as entirely inappropriate under supervening principles of federal law.

Finally, all three of the cases on which petitioner relies to support her proposed rule (Pet. 9) are decisions of the Fifth Circuit, which at most could establish an intracircuit conflict not worthy of this Court's review. Compare *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, none of those decisions supports petitioner. First, *RTC* v. *McCrory*, *supra*, actually supports the FDIC's position, because, as explained above, it held that the RTC *could* raise a claim on appeal that it did not raise before the trial court entered judgment. Second, as the court of appeals explained (Pet. App. A39), *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, *supra*, held only that the FDIC's special defenses did not protect an asset that never became part of the conservatorship estate; that rule has no application to petitioner's attempt here to collect punitive damages out of the receivership estate. Finally, *Thurman* v. *FDIC*, 889 F.2d 1441, 1447 (5th Cir. 1989), declined to accept post-judgment

defenses that would not have changed the outcome of the trial court's decision; the defenses in this case would—and did—result in judgment for the FDIC on the claim in question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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